A

See Teow Guan & Ors v Liqudators of Kian Joo Holdings Sdn Bhd (in liquidation) & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–563 OF 2003

TENGKU BAHARUDIN, SURIYADI AND HASAN LAH JJCA

9 NOVEMBER 2007

C

Civil Procedure — Injunction — Injunction for preservation of property — Delay of four years in applying for injunction — Whether inordinate and inexcusable

D

Civil Procedure — Injunction — Injunction for preservation of property — Pending appeal — Principles applicable

E

Companies and Corporations — Winding up — Liquidators — Officers of the court — Unless restrained, liquidators would proceed to sell shares forming subject matter of appeal — Whether court should interfere with liquidators' decision

F

The applicants had filed a motion pursuant to s 44 of the Courts of Judicature Act 1964 ('CJA') on the ground that unless an injunction was granted pending the hearing and disposal of the appeal, the liquidators of the Kian Joo Holdings Sdn Bhd (in liquidation) would proceed to sell all the 69,240,877 shares forming the subject matter of the appeal making the

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appeal if successful, nugatory and therefore academic as causing irreparable harm to the appellants. Kian Joo Holdings Sdn Bhd (the company) was incorporated on 27 March 1982 having 27 shareholders who were all members of the See family. On 10 September 1994 a petition was filed to wind up the company. Subsequently by consent of the parties, the high court

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on 30 January 1996 had ordered that the company be wound up, and liquidators appointed. On 12 July 1996, the liquidators convened a meeting of the contributories of the company pursuant to s 237(2) of the Companies Act 1965, to ascertain their wishes regarding the disposal of the shares and warrants in its possession. In that meeting two groups emerged viz the See

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Teow Chuan contributories ('STC group') and the See Teow Guan contributories ('STG group or the applicants'). At that meeting and confirmed in another, it was resolved that 55% in value and 52% in number of the contributories (that was the STC group) preferred a sale of the shares and warrants, whilst the remaining holders of 45% in value and 48% in

number of the shares ('STG group') preferred distribution of the shares and warrants in specie. Thereafter the liquidators, after coming into possession of the properties and after the said meetings, had wanted to implement the majority decision. Being aggrieved the STG group filed an application ('encl 191') to modify the said decision. At the end of the hearing of encl 191, the high court found that the STG group had failed to show how the liquidators had acted fraudulently or were mala fide in the exercise of their discretion, to warrant intervention by the court and dismissed encl 191. Being dissatisfied the applicants filed an appeal which was now pending before the court of appeal.

Held, dismissing the motion:

(1) It was quite established that an injunction for the preservation of property and other mandatory orders might only be granted in accordance with the principles applicable to the granting of interlocutory injunctions. It might be granted where the court was satisfied that there was a substantial question to be tried, and a case had been made out for the preservation of that property (*Nicholas & Ors v Gan Realty Sdn Bhd & Ors* [1970] 2 MLJ 89) (see para 12).

(2) The first reason was that unless restrained the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal. That was a reason that was quite unacceptable as these liquidators were appointed by the court, and hence officers of the court, who merely wanted to perform their duties (*Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; *Che Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204). Their decision to sell the shares at the best possible price would have benefited every shareholder including the applicants. The court here was not about to interfere with the liquidators' decision simply because its opinion might differ from that of the liquidator (see para 14).

(3) Not only was there not shown bad faith or perverse errors had been committed by the liquidators, but as per the supporting affidavit, the applicants had also not adduced any evidence that such sale would have caused irreparable damage to them (*Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Shiraz Nominees (in liq) v Collinson & Anor* [1985] 10 ACLR 7) (see para 15).

(4) The intention of their late father to have the shares retained by the family coupled with the fear of losing them, were inextricably intertwined to the fear of suffering a loss in value of the investment. These were not special circumstances (*Kosma Palm Oil Mill Sdn Bhd v*

Koperasi Serbaguna Makmur Bhd [2004] 1 MLJ 257). Mere fear and sentimentality certainly did not qualify as persuasive grounds construable as special circumstances (see para 16).

(5) Unexplained here too was the delay of four years by the applicants since 13 June 2003 to apply for this injunction order. Despite the conspicuous clarity of s 73 of the CJA, legislating that an appeal should not operate as a stay, the applicants took no steps whatsoever for four years to apply for this order. The unexplained delay of four years was inordinate and inexcusable and in the circumstances of the case quite fatal to the applicants' motion (*Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198; *Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Blue Town Investments LTd v Higgs and Hill plc* [1990] 1 WLR 696) (see para 17).

[Bahasa Malaysia summary

Pemohon-pemohon telah memfailkan satu usul mengikut s 44 Akta Kehakiman Mahkamah 1964 (AKM) atas alasan bahawa kecuali satu injunksi diberikan sementara menunggu pendengaran dan penyelesaian rayuan, penyelesai-penyelesai Kian Joo Holdings Sdn Bhd (dalam penyelesaian) akan meneruskan untuk menjual kesemua 69,240,877 saham-saham yang membentuk tajuk pokok rayuan tersebut menjadikan rayuan tersebut sekiranya berjaya, tidak berguna dan dengan itu akademik yang menyebabkan mudarat yang tidak boleh diperbaiki kepada perayu-perayu. Kian Joo Holdings Sdn Bhd (syarikat tersebut) ditubuhkan pada 27 Mac 82 dengan 27 pemegang-pemegang saham yang kesemuanya ahli keluarga See. Pada 10 September 1994 satu petisyen telah difailkan untuk menggulungkan syarikat tersebut. Selepas itu dengan persetujuan pihak-pihak, mahkamah tinggi telah pada 30 Januari 1996 memerintahkan bahawa syarikat tersebut digulungkan, dan penyelesai-penyelesai dilantik. Pada 12 Julai 1996, penyelesai-penyelesai mengadakan satu mesyuarat penyumbang-penyumbang syarikat tersebut mengikut s 237(2) Akta Syarikat 1965, untuk memastikan kehendak mereka berhubungan dengan penjualan saham dan waran-waran dalam milikannya. Di mesyuarat tersebut dua kumpulan yang berbangkit iaitu penyumbang-penyumbang See Teow Chuan ('kumpulan STC') dan penyumbang-penyumbang See Teow Guan (kumpulan STG atau pemohon-pemohon). Di mesyuarat tersebut yang dikekalkan di satu lagi, ia diputuskan bahawa 55% nilai dan 52% jumlah penyumbang-penyumbang (iaitu kumpulan STC) memihak satu jualan saham-saham dan waran-waran, sementara baiki 45% pemegang-pemegang bernilai dan 48% jumlah saham-saham ('kumpulan STG') memihak pengedaran saham-saham dan waran-waran dalam specie. Selepas itu penyelesai-penyelesai, setelah memiliki harta-harta tersebut dan selepas mesyuarat-mesyuarat tersebut, ingin

melaksanakan keputusan majoriti. Kerana terkilan kumpulan STG memfailkan satu permohonan ('kandungan 191') untuk mengubah keputusan tersebut. Pada akhir perbicaraan kandungan 191, mahkamah tinggi telah mendapati bahawa kumpulan STG telah gagal menunjukkan bagaimana penyelesai-penyelesai telah bertindak secara fraud atau mala fide dalam menggunakan budi bicara mereka, untuk mewajarkan campur tangan oleh mahkamah dan menolak kandungan 191. Kerana terkilan pemohon-pemohon memfailkan satu rayuan yang kini sebelum mahkamah rayuan.

Diputuskan, menolak usul:

(1) Adalah mantap bahawa satu injunksi untuk pemeliharaan sementara harta dan lain perintah-perintah mandatori mungkin hanya akan diberikan mengikut prinsip-prinsip yang dipakai kepada pemberian injunksi interlokutori. Ia mungkin diberikan apabila mahkamah berpuas hati bahawa terdapat soal substantif untuk dibicarakan, dan satu kes telah dikemukakan untuk pemeliharaan sementara harta (*Nicholas & Ors v Gan Realty Sdn Bhd & Ors* [1970] 2 MLJ 89) (lihat perenggan 12).

(2) Alasan pertama ialah bahawa kecuali dihalang penyelesai-penyelesai akan meneruskan untuk menjual 69,240,877 saham-saham yang membentuk tajuk pokok rayuan tersebut. Alasan ini tidak dapat diterima oleh kerana penyelesai-penyelesai dilantik oleh mahkamah, dan dengan itu adalah pegawai-pegawai mahkamah, yang hanya ingin menjalankan tugas mereka (*Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; *Che Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204). Keputusan mereka untuk menjual saham-saham pada harga yang terbaik yang boleh didapati akan menguntungkan setiap pemegang saham termasuk pemohon-pemohon. Mahkamah ini tidak akan mencelah keputusan penyelesai-penyelesai hanya kerana pendapatnya mereka mungkin berlainan daripada penyelesai (lihat perenggan 14).

(3) Bukan sahaja tidak dapat ditunjukkan niat jahat atau kesilapan yang terpesong telah dilakukan oleh penyelesai-penyelesai, tetapi seperti yang dinyatakan di afidavit sokongan, pemohon-pemohon telah juga tidak mengemukakan sebarang bukti bahawa penjualan sedemikian akan menyebabkan mudarat yang tidak boleh diperbaiki kepada mereka (*Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Shiraz Nominees (in liq) v Collinson & Anor* [1985] 10 ACLR 7) (lihat perenggan 15).

A (4) Niat mendiang bapa mereka untuk saham-saham tersebut dikekalkan oleh keluarga dan juga ketakutan kehilangannya, adalah jalin berkaitan dengan ketakutan kehilangan nilai pelaburan mereka. Kesemua ini bukanlah keadaan khas (*Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbaguna Makmur Bhd* [2004] 1 MLJ 257). Hanya ketakutan dan
B sentimental setentunya tidak layak sebagai alasan yang dapat dikatakan keadaan khas (lihat perenggan 16).

(5) Tidak dijelaskan di sini adalah kelewatan empat tahun oleh pemohon-pemohon semenjak 13 Jun 2003 untuk memohon perintah
C injunksi ini. Walaupun s 73 AKM jelas menonjol undang-undang bahawa satu rayuan tidak sepatutnya dijadikan sebagai penggantungan, pemohon-pemohon tidak mengambil sebarang langkah untuk empat tahun untuk memohon perintah ini. Kelewatan yang tidak dijelaskan untuk 4 tahun adalah satu kelewatan yang keterlaluan dan tidak boleh
D diterima dan dalam keadaan-keadaan kes ini adalah memudaratkan kepada usul pemohon-pemohon (*Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198; *Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Blue Town Investments Ltd v Higgs and Hill plc*
E [1990] 1 WLR 696) (lihat perenggan 17).]

Notes

For a case on injunction for preservation of property, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3028.

F For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1205–1243.

Cases referred to

American Cyanamid v Ethicon Ltd [1975] AC 396 (refd)

G *Blue Town Investments LTd v Higgs and Hill plc* [1990] 1 WLR 696 (refd)

Brigid Foley Ltd v Elliot [1982] RPC 433 (refd)

Canton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd & Ors [1988] 76 ALR 633 (refd)

H *Che Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 (refd)

Cheah Theam Swee & Anor V Overseas Union Bank Ltd & Ors [1989] 1 MLJ 426 (refd)

Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 (refd)

I *Hans Place Ltd (in liquidation), Re* [1993] BCLC 768 (refd)

Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbaguna Makmur Bhd [2004] 1 MLJ 257 (refd)
Nicholas & Ors v Gan Realty Sdn Bhd & Ors [1970] 2 MLJ 89 (refd)
R v Senate of the University of Aston, ex parte Roffey & Anor [1969] 2 All ER 964 (refd)
Shiraz Nominees (in liq) v Collinson & Anor [1985] 10 ACLR 7 (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 (refd)
Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd [1992] 2 MLJ 233 (refd)

Legislation referred to
Companies Act 1965 s 237(2)
Courts of Judicature Act 1964 ss 44, 73

Appeal from: Companies Winding Up No D4–28–294 of 1994 (High Court, Kuala Lumpur)

Izabella De Silva (Hasmaliza with her) (Iza Ng Yeoh & Kit) for the appellant.
VK Lingam (VK Lashmi with him) (VK Lingam & Co) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The applicants had filed encl 7(a), hereinafter referred to as the motion, and had prayed for the following reliefs:

(1) an order that the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) be restrained, whether by themselves or by their servants otherwise from disposing 45% of the 153,868,617 Kian Joo Can Factory Berhad shares totaling 69,240,877 ordinary shares of RM0.25 each; and

(2) such other or further order that this Honourable Court deems just and necessary.

[2] The grounds of this application are that unless an injunction is granted pending the hearing and disposal of this appeal, the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) will proceed to sell all the 69,240,877 shares forming the subject matter of this appeal making this appeal if successful, nugatory and therefore academic as causing irreparable harm to the appellants, more fully explained in the affidavit of Dato' See Teow Guan affirmed on 2 July 2007 in support of this application.

[3] We had unanimously dismissed the motion with costs. We now state our reasons.

[4] But first of all how did this motion come about? To answer that question there is a need first to peruse its antecedents. Kian Joo Holdings Sdn Bhd ('company') was incorporated on 27 March 1982 having 27 shareholders who were all members of the See family. On 10 September 1994 a petition was filed, as per Kuala Lumpur High Court Companies (Winding-up) No D4–28–294 of 1994, to wind up the company. Subsequently by consent of the parties, the High Court on 30 January 1996 had ordered that the company be wound up, and liquidators appointed.

[5] On 12 July 1996, the liquidators convened a meeting of the contributories of the company pursuant to s 237(2) of the Companies Act 1965, to ascertain their wishes regarding the disposal of the shares and warrants in its possession. In that meeting two groups emerged viz the See Teow Chuan contributories ('STC group') and the See Teow Guan contributories (STG group or the applicants). Basically they were siblings. At that meeting and confirmed in another, it was resolved that 55% in value and 52% in number of the contributories (that is the STC group) preferred a sale of the shares and warrants, whilst the remaining holders of 45% in value and 48% in number of the shares (the STG group) preferred distribution of the shares and warrants in specie.

[6] Thereafter the liquidators, after coming into possession of the properties and after the said meetings, had wanted to implement the majority decision. Being aggrieved the STG group had filed in court an application (encl 191) to modify the said decision. Enclosure 191 reads as follows:

1 That the court modify the decision of the liquidators to sell the entire controlling block of 42,741,276 Kian Joo Can Factory Berhad shares and 5,698, 835 warrants by excluding from the sale 19,233,039 Kian Joo Can Factory Berhad shares and 2,564,404 warrants representing 45% proportionate shares entitlement of the petitioners, Doris See Slew Lian and See Siew Hua.

2 That the court direct the liquidators to distribute in specie to the petitioners, Doris See Siew Lian and See Siew Hua proportionate number of Kian Joo Can Factory Berhad shares and warrants according to the Schedule annexed.

3 That the costs of this application be taxed and paid to the petitioners by the liquidators out of the company's accumulated funds.

4 An injunction restraining the Liquidators from disposal of Kian Joo Can Factory Berhad shares and warrants.

[7] At the end of the hearing of encl 191, the High Court found that the STG group had failed to show how the liquidators had acted fraudulently or were mala fide in the exercise of their discretion, to warrant intervention by the court. In the result encl 191 on 13 June 2003 was dismissed with costs. Being dissatisfied the applicants had filed an appeal. The appeal is now pending before the Court of Appeal.

[8] On 12 June 2007 the liquidators placed an advertisement in The Star inviting expression of interest from eligible buyers for the shares of Kian Joo Can Factory Berhad held by the company. The applicants filed the motion on 3 July 2007. The motion and the supporting affidavit supplied the following grounds for the reasons why the restraining order was sought, in that unless the reliefs were granted:

(1) the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal;

(2) unless restrained, a successful appeal would be rendered nugatory and academic, thus causing irreparable harm to the appellants;

(3) it had always been the intention of their late father as well as the family that these shares be retained by the family; and

(4) the price was too low and would result in multi million ringgit loss in value of the investment.

[9] The motion was made pursuant to s 44 of the Courts of Judicature Act 1964 which provision reads as follows:

Section 44

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

(3) Every order made under subsection may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the court.

[10] As gleaned from the above, s 44 of the Courts of Judicature Act 1964, empowers the Court of Appeal to grant any order that can preserve the integrity of any appeal pending before it. Previously for like-issues, an

appellant had to establish 'special circumstances' that warranted a stay of proceedings or of execution, in order to preserve the integrity of the appeal. Recent developments have shown that Malaysian courts have now shifted to more practical and less stringent approaches. In matters governing an application for a stay, or any other form of interim order, the approach is that no successful appeal should be rendered nugatory at the end of the day. Despite this pragmatic approach, there is no blank cheque that demands automatic granting of a restraining order in order to avoid any appeal being rendered nugatory. Persuasive reasons must still be ventilated and established to ensure a successful motion.

[11] The applicants' prayer here for a restraining order, of the liquidators whether by themselves or by their servants or otherwise, of disposing the shares was in effect and substance an interlocutory injunction. In fact the very motion had alluded to that terminology. Bearing in mind the prohibitive nature of this order, as said above unless persuasive reasons were supplied, the motion was doomed to fail. In *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 at p 150 the Federal Court had held that:

> The first is that it is couched in prohibitory terms restraining the appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd v Sandham* (at p 359); *Hounslow Local Borough Council v Twinckenham Garden Developments Ltd* (at p 570–1) and as I said in my judgment in *Wah Long (Jelapang) Tin Mine Sendirian Berhad v Chai Nyen Yiok, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases* (Emphasis added).

[12] It is quite established that an injunction for the preservation of property and other mandatory orders may only be granted in accordance with the principles applicable to the granting of interlocutory injunctions. It may be granted where the court is satisfied that there is a substantial question to be tried, and a case has been made out for the preservation of that property (*Nicholas & Ors v Gan Realty Sdn Bhd & Ors* [1970] 2 MLJ 89). And as in the *American Cyanamid v Ethicon Ltd* [1975] AC 396, smack on the issue of injunctions, there is the requirement that before a court exercises its discretion in favour of granting an injunction:

(1) there must be a serious question to be tried;

(2) there must not be any delay by the appellants in making the application;

(3) that if the appellants were to succeed at the appeal, damages would not be adequate compensation for its loss;

(4) that the balance of convenience lies in its favour; and

(5) the appellants must demonstrate evidence that its financial undertaking given to court is solid and worth powder and shot; and

(6) there are special circumstances in its favour including the justice of the case.

[13] At this interlocutory stage it is not the function of the court to resolve the issues on conflicting affidavit evidence, inclusive of difficult questions of law that require detailed argument or mature considerations.

[14] Let us now scrutinize the reasons for the motion. The first reason was that unless restrained the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal. That was a reason that was quite unacceptable as these liquidators were appointed by the court, and hence officers of the court, who merely wanted to perform their duties (*Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233; *Che Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204).

[15] Their decision to sell the shares at the best possible price would have benefited every shareholder including the applicants. The court here was not about to interfere with the liquidators' decision simply because its opinion might differ from that of the liquidator. Here, not only was there not shown bad faith or perverse errors had been committed by the liquidators, but as per the supporting affidavit, the applicants had also not adduced any evidence that such sale would have caused irreparable damage to them (*Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Shiraz Nominees (in liq) v Collinson & Anor* [1985] 10 ACLR 7). In *Re Hans Place Ltd (in liquidation)* [1993] BCLC 768 the court there had stated, amongst others:

> … The court would only interfere with the exercise of the liquidator's discretion where he acted in bad faith or his decision was perverse and since there were no allegations of this nature the court would not interfere.

[16] Ground 3, ie, the intention of their late father to have the shares retained by the family coupled with the fear of losing them, were inextricably intertwined to the fear of suffering a loss in value of the investment (ground 4). Regretfully these are not special circumstances (*Kosma Palm Oil Mill Sdn Bhd v Koperasi Serbaguna Makmur Bhd* [2004] 1 MLJ 257). Mere fear and sentimentality certainly do not qualify as persuasive grounds construable as special circumstances.

[17] Unexplained here too was the delay of four years by the applicants since 13 June 2003 to apply for this injunction order. They had filed the notice of appeal on 3 July 2003 and the appeal records were filed on 26 August 2003. Despite the conspicuous clarity of s 73 of the Court of Judicature Act 1964, legislating that an appeal shall not operate as a stay, the applicants took no steps whatsoever for four years to apply for this order. The unexplained delay of four years was inordinate and inexcusable and in the circumstances of the case quite fatal to the applicants' motion (*Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198; *Evercrisp Snack Products Sdn Bhd v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297; *Blue Town Investments LTd v Higgs and Hill plc* [1990] 1 WLR 696). In the case of *Canton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd & Ors* [1988] 76 ALR 633 at p 633 the Federal Court of Australia had as per the head note stated:

(iii) The applicant's delay was a sufficient reason for refusing an interim injunction

[18] In the case of *R v Senate of the University of Aston, ex parte Roffey & Anor* [1969] 2 All ER 964 at p 976 Donaldson, J had opined in the following manner:

> In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights. The applicant Pantridge's complaint is that he was not allowed to re-sit the whole examination in June 1968 and, if successful, proceed to the pass degree course in the 1968-69 academic year, yet he did not even apply to move this court until July 1968. By such inaction, in my judgment he forfeited whatever claims he might otherwise have had to the courts intervention. I would therefore refuse the relief sought.

[19] It was of the court's view that there was total failure on the part of the applicants to establish that there were serious questions to be tried which warranted such an injunction. As stated above, the fear of losing control of the shares, and suffering certain economic losses, did not qualify as serious questions to be tried. To make matters worse there was inordinate and inexcusable delay in filing this motion, in the light of the appeal having been filed in August 2003 whilst this motion being filed in 2007. In fact there was also no evidence adduced in the applicants' affidavit:

(i) showing that damages would be inadequate compensation for their losses; and

(ii) no evidence adduced to show their capacity and capability of honouring their financial undertaking as to damages (*Brigid Foley Ltd v Elliot*

[1982] RPC 433; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; *Cheah Theam Swee & Anor v Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426).

[20] It was for all the above reasons that we had dismissed the motion with costs.

Motion dismissed.

Reported by Sally Kee